FILE

No. 421

IN THE

Supreme Court of the United States

October Term, 1906

ROY HAZELTON, Administrator of the Estate of Charlotte Hazelton, Deceased,

Appellant & Petitioner,

vs.

CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Citizen of the City of Coronado,

Appellees & Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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THE CITY OF SAN DIEGO, a Municipal corporation, Councilmen of the City of San Diego, and the CITY OF CORONADO, a Municipal corporation, Councilmen of the City of Coronado,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Lee Roy Hazelton, Administrator of the Estate of Charlotte Hazelton, deceased, on behalf of himself and other persons similarly situated, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California entered in the above entitled case, and permit appellant to prove the allegations of the complaint on file in the State Court, or for leave to further amend upon the claim asserted.

OPINIONS BELOW

The Opinion of said District Court of Appeal (hereinafter referred to as the California Court of Intermediate Appeals) reported at 183 A.C.A. 140, is set forth as Appendix "A" in this petition. 4th Civ. No. 6170) The final order of the Court of First Instance, i.e. Superior Court of the State of California, County of San Diego, is set forth as Appendix "B" of this petition.

JURISDICTION

The judgment of the California Court of Intermediate Appeals was entered on July 25, 1960. A timely petition for rehearing was filed but denied by said Court on August 19, 1960. A timely petition for hearing was filed in the California Supreme Court which was denied by said Court on September 14, 1960, without an opinion. The jurisdiction of this Court is invoked under 28 U.S.C.A. section 1257(3).

QUESTIONS PRESENTED

May petitioner be precluded in an action filed by her, by an arbitrary and unreasonable state court determination of the fact in issue "of colorable compliance" at the pleading stage and upon demurrer, and thereby be denied a hearing on the merits concerning void annexations by a Municipal Corporation affecting her property, when said annexations have been conducted by said city, not only in violation of state law, but in violation of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States, Art. I, Sec. VIII (17):

"To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and . . ."

Constitution of the United States, Art. VI, Sec. 2:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Amendment XIV, section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

Ordinance 6222, City of San Diego, dated August 10, 1954. (See Appendix "C").

California Government Code, Sec. 35104:

"To qualify for annexation, new territory shall be contiguous to: (a) The city, or (b) Contiguous territory where the electors have voted for annexation to the city."

STATEMENT OF THE CASE

Petitioner, on behalf of said petitioner and other persons similarly situated, requested leave to sue in quo warranto, with the California State Attorney General, to bring Appellee municipal corporation, City of San Diego, herein, before the State Courts, to show by what authority it claimed jurisdiction to tax and control for other municipal purposes, an area adjacent to the International Boundary with Mexico, referred to as the "South Bay", wherein petitioner resided, owned property, and was a taxpayer.

The Attorney General first granted provisional leave to sue and then denied leave to sue in quo warranto on February 3, 1958, whereupon petition for Writ of Mandate was then filed by Petitioner to compel the Attorney General to grant leave to sue. (4th Civil 5883, Transcript herein of record California Court of Intermediate Appeals). Petition for mandate was denied on April 29th, 1958, without an opinion, and a petition for hearing in the California Supreme Court was denied on June 25, 1958, without an opinion.

On December 26, 1958, petitioner filed a petition for Writ of Certiorari, in the California Courts which after one amendment, demurrer to said petition was sustained without leave to further amend, and the California Courts refused to allow a hearing on the merits, with respect to municipal action done to accomplish an unlawful end, upon petitioner's allegations that the unilateral determinations of the State Attorney General were arbitrary, indefensible and did not accord petitioner her constitutional rights. It is requested by petitioner that the Supreme Court of the United States permit Appellant to prove the allegations of her complaint, or for leave to further amend upon the claim asserted therein.

It has been conceded by the State Attorney General of California in the matter at bar, "Opinion #57-154-Feb. 3, 1958" (4th Civil No. 5883) (published in 31 Opinions Attorney General California 55 and made a part hereof as Appendix "E") Exhibit II, as part of the record before the California Supreme Court, in denying petitioner request to sue in quo warranto, as follows:

> "Petitioner's original petition attempted to state causes of action . . . upon the grounds that the . . . were void annexations . . ."

The acts which violated the 14th Amendment and deprived petitioner of due process of law and which constituted a void assumption of municipal jurisdiction, were called to the attention of the California State Court of Intermediate Appeals under the heading of "The Three Annexations should be considered as one fraudulent attempt to obtain a water corridor and territory in the South Bay" (Reply Brief by Pe-

tioner, pgs. 1-12, 4th Civil No. 6170). (Also page 3, appellant's petition for rehearing, 4th Civil No. 6170).

REASONS FOR GRANTING THE WRIT

THE STATE LAW DID NOT PROVIDE ADEQUATE NOTICE AND OPPORTUNITY TO ENABLE PETITIONER'S TO DEFEND THEIR PROPERTIES AND LIBERTIES FROM A VOID ASSUMPTION OF MUNICIPAL JURISDICTION BY APPELLEE CITY OF SAN DIEGO, AND THERE IS AN IMPELLING NEED FOR A DETERMINATION OF THE IMPORTANT QUESTION OF CONSTITUTIONAL LAW, I.E. WHAT NOTICE IS NECESSARY WHICH IS REASONABLY CALCULATED TO INFORM PARTIES OF PROCEEDINGS WHICH MAY DIRECTLY AND ADVERSELY AFFECT THEIR LEGALLY PROTECTED INTERESTS.

UNDER THE CIRCUMSTANCES, IN THE CASE AT BAR, UNCERTAINTY HAS CREATED RELATIVE TO MUNICIPAL BONDED INDEBTEDNESS, FUTURE MUNICPAL BOND ISSUES, VALIDITY OF MUNICIPAL ORDINANCES, ZONING RESTRICTIONS, PAYMENT OF TAXES BY RESIDENTS OF ALLEGEDLY ANNEXED AREAS, AND OBLIGATIONS WITH THE GOVERNMENT OF THE UNITED STATES, WHICH IF NOT SETTLED WILL OCCASION MULTIPLE ACTIONS.

The Supreme Court of the United States, in the case of *Ocean Beach Heights, Inc. vs Brown-Crummer Inv. Co.*, 58 Sup. Ct. 385, considered the question post facto of municipal bonds which had been issued in a case of a non-contiguous annexation, contrary to the requirement that there be contiguity, as in the case at bar. The town (assuming it had validly incorporated both sides of a Bay) had issued bonds to the

extent of $280,000.00. On hearing in the Supreme Court, the judgment of the Court below was reversed with instruction to limit its effect to the west side only "as the east side lands never became liable to be taxed by the town to pay its bonds", even tho acquiesced in by the owners of land on the "eastside."

Said the Supreme Court, at page 387:

> "The town de jure could not be made to include the east side. Mere inspection of the statute and the defined boundaries unmistakably shows that the west side electors were without authority to incorporate the east side tract with that in which they resided. *Unquestionably, these were detached tracts within the meaning of the statute*". (our italics)

The area in the case at bar was a detached tract non-contiguous to the City of San Diego, within the meaning of the state statute.* The edifice of two annexations, latter of which affected appellants liberties and properties, was based upon this detached water strip annexation herein referred to as Municipal Ordinance No. 6222, which if void must of necessity cause the entire edifice of said interdependent annexations to tumble. Said water strip annexation is described as the "San Diego Harbor Tidelands" and often referred to in the record as the water corridor annexation.

The blue print of said series of annexations was proclaimed by resolution No. 115920 of the City of

* *California Government Code, Sec.* 35104:

"To qualify for annexation, new territory shall be contiguous to: (2) The city, or (b) Contiguous territory where the electors have voted for annexation tot the city."

San Diego adopted December 23, 1953, (Appendix "D") which resolution was not at any time published nor notice thereof given to any person, the only record of the same appears in the Clerk's Office of the said City of San Diego which cannot in any manner be construed as notice to persons residing out of the said city. The said City Council of the City of San Diego acted upon a petition presented by thirteen residents of the South Bay Area for the Annexation of said South Bay to the City of San Diego "if a link down San Diego Bay could be established" (31 Opinions Attorney General California, pg. 55) (Appendix "E").

Said resolution stated in response to said petition by said thirteen persons, as follows:

> "That this Council approves in principle the annexation to the City of San Diego of all of the unincorporated area of the Bay of San Diego, and herein and hereby directs the City Manager and City Attorney to institute the necessary procedures which will result in the incorporation of said unincorporated area of the bay as a part of the City of San Diego."

The first, or foundational proceedings of this single structure, upon which said edifice rested, i.e. Municipal Ordinance No. 6222 (Appendix "C") recited on its face that written notice of the annexation had been mailed to each person whom land within the territory proposed to be annexed was assessed, inclusive of the State Attorney General of the State of California, and that two publications of said notice were had in a newspaper of general circulation published in the cities of San Diego and Coronado, but not published in the South Bay area where appellant owned property

and resided, although there were newspapers of general circulation published locally, inclusive of the Bay Cities Press.

Said Municipal Ordinance No. 6222, which referred to the notices shows that the notices did not contain a description of the territory to be annexed, and only referred to a resolution, copy of which resolution did not appear in the said referred to notices, nor did the Ordinance divulge the fact that it constituted part or parcel of three interdependent annexations, already blue printed and decided upon, in the architectural plans of the whole proceedings.

Said Municipal Ordinance No. 6222 restricted itself ostensibly to a water area in the Pacific Ocean, San Diego Bay, which is uninhabited, and to whosoever no property is assessed, and notice of intended annexation could not possibly have been deemed notice to any human being resident of the area, unless it referred to the denizens of the deep waters of the ocean. The notices were not directed to appellant, residents of the South Bay area who resided, many miles away, and as to them did not comply with due process of law. Even tho the purpose of said ordinance as pleaded below was, and subsequent events confirmed, part of an entire proceedings, to annex said area illegally as hereafter set forth.

No notice reasonably calculated to inform parties of proceedings which might directly and adversely affect their legally protected interests was given. (*Covey vs. Town of Somers*, 351 U. S. 141; *City of New York vs New York*, 344 U. S. 293; *Mullane vs. Central Hanover Bank*, 339 U. S. 306, 314-315; *Walker vs.*

City of Hutchinson, 352 U. S. 113 (See Ordinance 6222, Appendix "C").

After time to protest had lapsed said Ordinance 6222 was prefunctorily passed by the Municipal Corporation of the City of San Diego, and annexation of a detached area, as hereinafter specified, became an accomplished fact on August 10, 1954.

Said Ordinance set forth in full hereunder, recited that no protests were filed against the proposed annexation, and in all of its recitals, inclusive of its title and preamble, it advised that the subject matter of the annexation related to SAN DIEGO HARBOR TIDELANDS. (Appendix "C")

To an informed citizenry which would be responsive to said notice, SAN DIEGO HARBOR TIDELANDS could have but one meaning i.e. only those portions of land along the shore line which were submerged at high tide and exposed at low tide.

Referring to the definition of "tide lands" wherein the California State Supreme Court described them as "those portions of land along the shore line which were submerged at high tide and exposed at low tide", said Court said:

> "In their natural state, these tidelands were apparently of little value for any purpose, and were obviously of little value for navigation or commerce because of the relatively shallow water which covered them even when the tides were at their highest."
>
> *Mallon v. City of Long Beach*, 144 Cal.(2) 199, 213 infra, 214 supra.

The notice excepted to upon federal grounds herein, further recited that because the tidelands referred to were within the boundaries of the City of Coronado and had been also annexed by the City of Chula Vista, some of the tidelands were eliminated, and another resolution was passed by the Municipal Corporation of San Diego, upon the annexation of said tidelands".

After said Municipal Ordinance was passed and it was too late to lodge protests to its passage, it did not occur to, nor would it be within the contemplation of an informed person owning property wherein Appellant resided as herein specified, to suspect that the detailed metes and bounds description which were publicly published for the first time of the area already affected, would consist of an area other than that of San Diego Harbor Tidelands. The area annexed, thereby, consisted of a strip of water in navigable waters in the middle of San Diego Bay, six miles long and approximately 300 feet wide, without contiguity to the City of San Diego.

Thereupon the municipal corporation of San Diego annexed the South Bay area, pursuant to resolution of intention (pg. 10, para. VIII, Cl. Trans. 4th Civil No. 6170) wherein Appellant resided and owned property, by claiming it was contiguous to the Western Salt Company Tract annexation, (pg. 10 Cl's. Trans., para. IX, 4th Civil No. 6170). Said Western Salt Company Tract annexation, or second proceedings of annexation, constituted an extension of the void San Diego Harbor non-contiguous so called Tidelands annexation. The sole owner of the area of land encompassed in said second proceedings had consented to having his property annexed as uninhabited territory

to the southern tip of said void San Diego Harbor Tidelands annexation, at which point, after going around two cities by water, the City of San Diego came ashore! (See pleadings of appellant, Cl. Tr., para. XI, (1) (2) (3) (4) (5) (6), page 10, lines 25-32, page 11, Lines 1-30; 4th Civil No. 6170.)

Mere inspection of the statute and the defined boundaries in the case at bar, as well as the map, (4th Civil No. 5883, Exh. IV) filed before the Supreme Court as part of the record herein, indicates that the properties are detached tracts, non-contiguous to the Appellee City of San Diego, and no one under such circumstances should be compelled to rely upon mere refusal of the Attorney General to permit institution of legal proceedings which would determine for all time the fundamental rights of the parties, contrary to due process of law, and the *authority* of Appellee municipal corporation of San Diego in the first instance.

> "When a state power is used to circumvent a federally protected right, even in the matters concerning municipal boundaries, State Municipal manipulation, is restrained."
>
> *Gomillion v. Lightfoot*, 5 L. Ed. (2) 110, Dec. 5, 1960.

On August 7, 1957, approximately five weeks before September 13, 1957, when the City of San Diego filed its third proceedings of annexation directly affecting Appellant's property with the Secretary of State, Appellant and the City of Imperial Beach, requested the California Attorney General to sue the City of San Diego in quo warranto to test the validity of the annexations as one transaction, illegally divided

into three proceedings, to procure a non-contiguous fraudulent water corridor and territory into the South Bay area. The Attorney General delayed action on the timely objections, so on December 12, 1957, it was called to his attention that action must be commenced by him immediately under *California Code of Civil Procedure*, Section 349½, or the three months statute of limitation would run. Provisional leave to sue was thereupon granted on December 12, 1957, being the last day of the three months statutory limit, and on the same date quo warranto in relation of applicant, City of Imperial Beach and others was then and there filed in the Superior Court in and for the County of San Diego as quo warranto action No. 220773 and 220809*, files of said Court. (Cl. Tr., page 8, para. VII, 4th Civil No. 6170). Both of said actions were dismissed by the Attorney General before issue by answer.

On *February 3rd*, 1958, the Attorney General of California, who had theretofore given provisional leave to sue; arbitrarily reversed his stand and denied leave to sue the City of San Diego, in quo warranto, to determine the right of said City to exercise control over the three interdependent annexations, and gave as a ground for denial that the application for leave to sue was not filed until almost three years after the completion of the annexation of the San Diego Harbor Tidelands Annexation, and over two years after the completion of the Western Salt Com-

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* 2 actions in quo warranto:

220774—State of Calif. by Atty. Gen. Brown on relation of Imperial Beach. filed 12-12-57.

220809—State of Calif. by Atty. Gen. Brown only. filed 12-13-57.

pany Tract Annexation. (31 A. G. Op., pp. 55, 56) (Appendix "E")

Appellant for the first time became an aggrieved party to the proceedings or happenings above set forth, upon a question of his constitutional rights, and made an issue of and concerning the illegal and void water strip annexation, upon which the validity of the annexation affecting his property depended, and thereupon attacked the validity of said strip annexation. Action on part of Appellant prior thereto would have been premature.

The determination of the State Attorney General appears in the following language:

> "Leave to sue is denied as of all three of the San Diego annexations. Provisional leave to sue heretofore granted pursuant to the provisions of Section 10, title 11 of the California Administrative Code concerning the South Bay annexation is hereby withdrawn. Applicant City of Imperial Beach is directed to dismiss the complaint filed December 13, 1957, in San Diego County".

The Supreme Court of the State of California did not dispose of the application of petitioner to compel leave to sue in quo warranto, upon petition for writ of mandate sought by petitioners until June 25th, 1958, when said petition for mandate was denied without opinion by said Supreme Court.

It is submitted, that the above series of steps rooted in design, without due process, have as well rendered nugatory, by purposeful discrimination in the application of the law, all efforts advanced by the segment of citizens, represented in the case at bar, within the

framework of state law, as to deny them the equal protection of the law as specified with particularity herein. That the withholding of procedural action upon the part of the state Attorney General, being the allegedly sole remedy given to appellants, until outlawed by a 90 days statute of limitations deprived appellant of the equal protection of the laws in addition to the inadequate notice in violation of due process of law. (hereinabove related)

2. THE PETITION COMPELS A DETERMINATION OF THE IMPORTANT QUESTION OF CONSTITUTIONAL LAW AS TO WHETHER THE UNITED STATES SUPREME COURT UNDER TH. CIRCUMSTANCES IN THE CASE AT BAR MA' INVOKE ITS JUDGMENT TO EXAMINE PLEADINGS TO WHICH A DEMURRER HAS BEEN SUSTAINED WITHOUT LEAVE TO AMEND, AND WHEREIN A STATE COURT HAS BY FINALITY OF JUDGMENT BASED ITS DECISION ON NON-FEDERAL GROUNDS WHICH HAS RESULTED IN THE EVASION OF A CONSTITUTIONAL ISSUE AND WHETHER THE UNITED STATES SUPREME COURT MAY REMAND TO THE STATE COURT TO PERMIT PETITIONER TO ASSERT AND PROTECT HER CONSTITUTIONAL RIGHTS.

If there are facts which could be presumably pleaded within the framework of the claims and conclusions pleaded by Applicant before the State Court in violation of appellant's fundamental rights, the Supreme Court may give relief and the State Court cannot preclude appellant from proceeding to trial thereon or from amending her complaint to plead appel-

lant's claim of violation of her rights under the Constitution of the United States.

Brooklyn Savings Bank vs. O'Neil, 324 U. S. 697, 703.

Merchant's Nat'l Bank vs. Richmond, 256 U. S. 635, 638.

When the State Court shall in the process of deciding a case on non-federal grounds unreasonably enunciate a doctrine of colorable compliance, or an unreasonable conclusive presumption, or shall unreasonably take judicial notice of facts determinative of the case at issue, without providing an opportunity to refute or contradict such issue sought to be made conclusive, and, that such doctrine is a pretext for dispensing with a trial, such action will be determined by the Supreme Court as arbitrary, and the denial of a fair opportunity to repel or refute in the premises, violates the due process clause of the 14th amendment.

Ohio Bell Tel. Co. vs Commission, 301 U. S. 292.

The State Court of Intermediate Appeals declared that petitioner for certiorari could not ask for a review, as the word of the Attorney General was final and "none but the State could call its existence in question, that the petitioner had exhausted her legal remedy."

It was conceded by all parties that a de facto existence of municipal jurisdiction could not be predicated upon prohibited or unauthorized proceedings in law, since neither the passage of time nor the

exercise of municipal functions could create such a de facto existence.

Reference to the petition for certiorari filed by Petitioner in the State Court, shows that petitioner alleged that the proceedings conducted by the City of San Diego were prohibited or unauthorized by law. (Cl. Tr. 4th Civil No. 6170, pp. 7 & 8) In the stage of a general demurrer, i.e. mere pleadings stage, wherein matters charged in a complaint are admitted as true, the arbitrariness of the determination by the California Court of Intermediate Appeals appears in the following language:

> "Suffice it to say that there was a colorable attempt to comply with the annexation statutes . . . we are inclined to feel that all of the annexation proceedings were in compliance with the law . . . there is no showing that the proceedings conducted by the City of San Diego were prohibited or unauthorized in law." (Appendix "A")

Appellant's pleadings on file before the State Court affirmatively allege that the proceedings of the City of San Diego were prohibited or unauthorized by law; paragraphs VII, VIII and IX thereof, allege the following: (Cl. Tr. pg. 8, lines 12-29, 4th Civ. No. 6170)

> ". . . The Attorney General denied leave to sue . . . Writ of Mandamus in the Supreme Court of the State of California . . . was denied . . . the the only recourse open to plaintiff is this petition for writ of certiorari, which is the proper legal remedy to attack an alleged void annexation proceeding . . . and also to attack improper and illegal assessment of taxes".

In paragraph XII of said pleading, the following appears: (Cl. Tr. pg. 12, lines 1-6, 4th Civ. No. 6170)

> "Plaintiff, Charlotte Hazelton, is merely one of several persons subject to said unconstitutional taxes and assessments because of the alleged annexation, which annexation depends for its validity upon the 1954 'Water Corridor' annexation involving a strip of tidelands and navigable water of San Diego Bay".

Paragraph VII of Appellant's amendment to Petition for Writ of Certiorari (Cl. Tr., page 24, 4th Civ. No. 6170) refers to and identifies Ordinance No. 6222 hereinabove identified of the City of San Diego passed on August 10th, 1954, as the basis of said Municipal Corporation's government control of the area involved.

In paragraph XI (6) of her complaint, she alleged as follows: (Cl. Tr., pg. 11, lines 27 through 30, 4th Civil No. 6170)

> "Plaintiff's property has been subject to illegal, invalid and void assessment because it is located in an area over which the said City of San Diego illegally, erroneously and unconstitutionally claims the right to levy taxes and assessments."

The California Court of Intermediate Appeals, in excess of its powers, purported to render a final judgment. (Appendix "A") and establish a rule of law clearly inapplicable to the allegations of the petition before the State Court. The inapplicability of the rule of law established by the Opinion of the Court, to the claims of petitioner in the case at bar is in substance admitted by the California Attorney General, wherein said Attorney General of Cali-

fornia, in Opinions 31 Ops. Atty. Gen. 55 (Appendix "E", pg. 21e) concedes that *C.C.P.* 349½, which announces the statutory period of three months within which to contest completed annexation proceedings, does not apply to cases involving an annexation where the territory annexed was many miles from the annexing city, with absolutely no connecting link. The Attorney General of California stated in said Opinion; relative to territory annexed many miles from the annexing city, that "there is doubt whether *Code of Civil Procedure* section 349½ would be held to cure the lack of contiguity". (Appendix "E", pg. 16 infra of said Opinion).

The only matter which the State Attorney General does not concede in the case on appeal is the factual question of whether there is or there is no connecting link between the annexing City of San Diego, and the area sought to be annexed which admittedly is a territory many miles from the annexing city. This factual question was resolved contrary to Appellant's contention at the pleading stage, without a hearing or trial on the merits, or one which complied with due process of law even though the prima facie claim was stated that the annexation proceedings were void.

> "If facts setting up a federal right in the pleadings are demurred to and the matter proceeds to judgment, the Supreme Court is at full liberty to consider the facts alleged in the complaint."
>
> *Boyd vs. State of Nebraska*, 143 U.S. 135.
> *Postal vs. City of Newport*, 247 U.S. 464.

> "Since the petitioner claims denial of his rights under the Federal Constitution, the U. S. Su-

preme Court was not bound by the factual conclusion reached by the Illinois Supreme Court, but may re-examine the conclusion".

Napue v. Illinois, 360 U. S. 264.

Justice Holmes, writing for the Court, which reversed the Court of Appeals of Missouri, which denied a writ of certiorari upon the grounds of local practice, in the case of *Davis vs. Wechsler*, 263 U. S. 22, 24, said:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of a State tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

In *Niemotko v. Maryland*, 340 U. S. 268, 270, 271, the Court said, upon denial of the Maryland Court to take the case on certiorari because the issues were not "matters of public interest":

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound 'by the conclusions of lower courts'."

THE PROCEEDINGS CONDUCTED BY THE CITY OF SAN DIEGO WERE PROHIBITED AND UNAUTHORIZED BY ARTICLE I, SECTION 8 (17) OF THE UNITED STATES CONSTITUTION.

Writ of review filed by applicant attacked an allegedly unauthorized and prohibited annexation by a Municipal Corporation, as void, that neither the passage of time nor the transient and temporary ex-

ercise of Municipal functions could make a void annexation valid.

Appellees and State Courts, in the case at bar, have contended that since the annexations have been procedurally completed and the Municipal Corporation's attempts were "colorable" attempts to comply, that appellants remedy in quo warranto, which was denied her, by the State Attorney General, has exhausted appellant's legal remedies.

"Petition of hearing", in the Supreme Court of the State of California, pg. 26, reiterated specifically the claim of appellant "that since the Tidelands annexation is not contiguous to the City of San Diego, it is therefore void".

Exhibit "IV" of Appellant's Petition for Writ of Mandamus Volume II, Exhibits, 4th Civ. No. 5883 herein refers to a map of San Diego Bay. Between the City of San Diego and the area wherein contiguity is proposed for the territory sought to be annexed, is an area which reads "U. S. Naval Repair Base". A prolongation of said line through the said Base, across the Bay to the City of Coronado, is the line which purportedly forms the base or contiguity of the San Diego Water Corridor Annexation. With regard to said line, Robert Henrich, Engineer for the San Diego County Boundary Commission reported, at its duly convened meeting of January 5, 1954, with regard to said water corridor annexation: "It precludes any contiguity except at a point, which is not sufficient."

The basis for said conclusion of said Mr. Henrich was obvious, in that it assumed that San Diego could prolong its southern boundary through territory ex-

clusively within the jurisdiction of the Federal Government and beyond into the Bay and to the City of Coronado, at which point it could do no more than circle the City of Coronado, which is a peninsula and does not form a connection at any point with the City of San Diego, or if further prolonged would not reach any point or other boundary of the City of San Diego under any circumstance whatever. (make reference to map, 4th Civil 5883, Ex. IV)

The California Court of Intermediate Appeals (Appendix "A"), in declaring that petitioner's claim consisted of conclusions and deprived her of the right to amend, has prevented the determination that the Municipal Corporation of San Diego assumed political jurisdiction contrary to Article I, Section 8 (17) of the United States Constitution, over an area where exclusive legislative jurisdiction was in the Congress of the United States.

In Paragraph VII of said pleadings (4th Civil No. 6170, Page 5, Cl. Tr., page 24), it is alleged as follows, in connection with a claim of Municipal jurisdiction to the water area involved and which appellant claims to be under exclusive Congressional legislative jurisdiction:

> "An inspection of the map of San Diego Bay shows the patent absurdity of such a claim as to (City) governmental control . ... to attempt to provide contiguity to land areas in the South Bay Area."

In paragraph VI of said pleadings, the following appears: (4th Civil No. 6170, Cl. Tr., pg. 8, lines 4 to 9)

"The defendant . . . City of San Diego . . . is exercising jurisdiction over said territories".

In paragraph III of appellant's amendment to Petition for Writ of Certiorari (4th Civil No. 6170, Cl. Tr., pg. 23, lines 15-19), it is alleged:

". . . since the 'Water Corridor' cannot therefore be a part of the City of San Diego, the subsequent attempted annexation . . . South Bay annexation . . . void for lack of jurisdiction . . ."

It is patent from the map (4th Civil No. 5883, Ex. IV) that the water corridor annexation does not border the City of San Diego as admittedly required.

The point or line to which said water corridor (San Diego Harbor Tidelands) annexation purportedly connects is an extension from the City of San Diego through the United States Naval Repair Base (map, Ex. IV, 4th Civil No. 5883) which base was purchased by the United States with the consent of the California Legislature within the provisions of Article I, Section 8 (17) of the United States Constitution. The political jurisdiction of the City of San Diego, the State of California and the Legislative Jurisdiction of the Congress of the United States within the said area have by said state court decision become inconsistent and contradictory.

It is clear from the reading of the decision of the State Court, and the decision of the Attorney General upon which it is based, and the allegations in support of appellant's claim, that the issues in the case at bar, if permitted to proceed to a hearing and trial upon the merits, what appears to be a conflict of political jurisdiction between the Federal and State Government can be determined, and political overlapping

eliminated in accordance with law and fact and after due consideration.

However, the said California State Court by its summary decision in the premises, and by granting conclusive weight to the opinion of the Attorney General with regard to the unilateral San Diego Harbor Tidelands Annexation of the City of San Diego, has sought to by inaction to establish as de facto and thereby indisputably within the City of San Diego, territory which cannot by the passage of time or acquiesance become a part thereof, by reason of null and void annexation proceedings which lack contiguity, and territory which is within the exclusive jurisdiction of the United States.

The case of *Ex-Parte Tatem*, 23 Fed. Case 708 (Case No. 13759 E. D. Va. 1877) under the Virginia Cession statute, it was held that the term Navy Yard, "Meant not merely the land on which the government does work connected with ships of the Navy, but the waters contiguous necessary to float the vessels while at the Navy Yard".

The California State Legislature contemplated, and consented to the establishment of legislative jurisdiction by the Federal Government in said area, in Act 6881, conveyance of tidelands . . . to the City of San Diego (Stats. 1911, page 1337, etc., Statutes 1943, Ch. 70), pertinent portion of which reads as follows:

> "to the City of San Diego . . . all of the lands situate on the City of San Diego side of said bay, lying and being between the line of mean high tide and the pier head line in said bay, 'as the same has been or may hereafter be established by the Federal Government' . . ."

Also cession statutes of the State of California are found in Appendix "F". Additional parcels of land have been continuously acquired by the Federal Government with the consent of the California legislature, both by purchase and legislative act, extending into what is purportedly San Diego and National City upon the boundary line in dispute and the area which is marked "U. S. Naval Repair Base" (Map, Ex. IV, 4th Civ. No. 5883), to which reference in detail would only consume needless printing and space.

The conveyance thus made, subject to Federal Government jurisdiction, specifically describes land on the City side of said Bay from the "boundary line between the City of San Diego and National City, and the 'prolongation' into the Bay of San Diego *to the pier head line* of the northerly line of the United States Military reservation of Point Loma".

It is clear that the legislative grant of California that the tidelands up to the pier head on the City side of the Bay to the Military Reservation on Point Loma, located at N 8° 04 12 W" 498.14, described and restricted the conveyance to a ribbon of water adjacent to the inner Bay on the City side of San Diego, and not across or into the Bay of San Diego.

The California State legislature was mindful of the fact that any alleged claim of the City of San Diego to the San Diego Bay area, on its southern boundary, across the Bay to the Pacific Ocean, was void, in that said State Legislature in its General Law, Acts 1702-1704, Statutes 1923 Amended Stats. 1929 et. Statutes 1949, Ch. 1013, amendment of 1949, in granting the use of tidelands and submerged land to the City of Coronado, another Municipal Corpora-

tion, and appellee herein located in the middle of San Diego Bay, specifically referred to the fact that said baylands were located in the *County of San Diego*. Thus, pertinent portion of the grant reads as follows:

> "There is hereby granted and conveyed to the City of Coronado, a municipal corporation in the County of San Diego, State of California . . . all tidelands and submerged lands (whether filled or unfilled), and situated upon the Coronado side of the Bay of San Diego, *in the County of San Diego*, State of California, lying between the line of mean high tide and the pierhead line in said bay, as said pierhead line has been or may hereafter be established by the Federal Government, and between the prolongation of the easterly boundary line of the City of Coronado into Glorietta Bay, a portion of said San Diego Bay, and the prolongation of the westerly boundary line of said City of Coronado into Spanish Bight, a portion of said San Diego Bay."

The area where the alleged southern municipal limits of the City of San Diego attached to the fictitious water corridor, over which the Municipal Corporation had no jurisdiction, had been detached by State Legislative action and Municipal conduct, prior thereto, de facto if not de jure, and at the commencement of the annexation proceedings, validity of which the annexation of the South Bay Area depends in the case at bar, there was no contiguity to the City of San Diego, either by sea, or land! The so called contiguous area was not subject to the exercise of the legislative discretion of said appellee Municipal Corporation and any doctrine of colorable compliance under the cir-

cumstances here delineated has invoked a federal question under the U. S. Constitution where ordinarily a state question only would be presented, under the inhibition of the Federal Constitution concerning the exclusive legislative powers of the Federal Congress.

With regard to Appellee City of Coronado, Appellant was denied a hearing upon the following allegations of the complaint before the state court (Cl. Tr., pg. 22, lines 1-10, 4th Civ. No. 6170):

> "That prior to the attempted annexation by the City of San Diego of the 'Water Corridor' on June 25th, 1954, in Resolution No. 2485 of the City of Coronado, California, entitled: 'A Resolution Consenting to the Withdrawal of Territory from the City of Coronado' (which purported to consent to the detachment from the City of Coronado the area involved in the 'Water Corridor' annexation), only two councilmen voted 'Aye', one voted 'Nay' and two were absent, copy thereof is attached as Exhibit III. The council meeting on June 25th, 1954, was on a Friday afternoon and was a special meeting and not a regularly scheduled meeting."

Appellant continued with the following allegations set forth specifically in her complaint before the state court (Cl. Tr., pg. 23, lines 4-19, 4th Civ. No. 6170):

> "Plaintiff further alleges on information and belief that prior to the special meeting called on June 24, 1954, each member did not receive written notice at least three hours before the meeting or did not give their written consent in writing as required by section 36806 of the Government Code. Accordingly all proceedings of the special

meeting, which consisted solely of the passage of the aforementioned resolution are void for want of proper notice. Accordingly, it is complained that the 'Water Corridor' was not legally annexed by the City of San Diego, because the City of Coronado did not legally consent to its detachment by resolution as required by law. Therefore, the City of San Diego does not have jurisdiction. Further, since the 'Water Corridor' cannot therefore be a part of the City of San Diego, the subsequent attempted annexation of the Western Salt Company and the San Diego-South Bay Annexation are void for lack of jurisdiction because of a failure of contiguity."

IN CONCLUSION

The attempted exercise of state and municipal jurisdiction over an area which by express provisions of the United States Constitution was lodged exclusively in Congress, and an attempted use of said place for contiguity purposes for a water annexation approximately 300 feet wide and six miles long, to go around two cities and annex an area which is inaccessible and 6 miles distant by land to the purported annexing city, was not only a void proceedings and contrary to the spirit and objectives of the California law concerning the subject of annexations, but its invalidity is compounded, when a state in controlling its' internal affairs has devised legal procedure which effectively prevents a hearing on the merits to ascertain invalidity under State law; and, the same procedure effectively restrains a hearing upon issues

which arise or may arise under the constitution of the United States.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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